U. S. Senate
Republican Policy
Committee

Larry E. Craig, Chairman Jade West, Staff Director

Legislative Notice

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Election Reform:
Senate Amendment No. 2688 to S. 565,
The "Equal Protection of Voting Rights Act"

Calendar No. 239

S. 565 was reported from the Committee on Rules and Administration on November 28, 2001, without amendment and without written report. Senate Amendment No. 2688 is a substitute amendment introduced on December 19, 2001 (text at *Congressional Record* pages S13764-71).

NOTEWORTHY

- An election reform bill could be on the Senate floor soon. No agreement has been reached.
- Substitute amendment No. 2688 (introduced by Senators Dodd, McConnell, Schumer, Bond, Torricelli, McCain, and Durbin) is likely to be the relevant legislative language on the floor. The underlying bill, S. 565, had no Republican support in committee. [This *Legislative Notice* addresses only the substitute, not the underlying bill.]
- The House of Representatives passed its election reform bill (H.R. 3295, often called the Ney-Hoyer bill) on December 12, 2001, by a vote of 362 to 63. President Bush commended the House for its action.
- The House bill and the Senate substitute have many similarities, but they also have key differences. Many State and local officials who supported the House bill have strong reservations about the Senate substitute.
- The Senate substitute requires States to allow provisional balloting; set up a system to alert voters to their overvoting; make voting available to persons with disabilities and to language minorities; and implement a Statewide voter registration list and maintain that list. The Senate bill also gives oversight power to the Department of Justice, and it creates a new independent Federal agency, the Election Administration Commission.

- Grant money is distributed through competitive grants, but organizations of State and local officials support formula grants.

HIGHLIGHTS

In their introductory statements of December 19, 2001, Senator Dodd said the amendment incorporated three "minimum standards for Federal elections," and Senator McConnell said the bill was consistent with three "key principles" that he had been advocating:

Senator Dodd

"[T]his compromise sets the following three minimum standards for Federal elections:

"[First,] beginning in the year 2006, election systems must meet voting system standards providing for acceptable error rates, and provide notification for voters who overvote, while ensuring such systems are accessible to every blind and disabled person, and to language minorities, in a manner that ensures a private and independent vote.

"Second, beginning in the year 2004, States must have in place provisional balloting systems so that no registered voter in America can ever be turned away from the polls without the opportunity to cast their ballot.

"Third, States must establish a statewide computer voter registration list, and beginning next year, provide for verification for voters who register by mail in order to prevent fraudulent voting." [page S13682]

Senator McConnell

"The agreement we announced last week incorporates three key principles that I have been promoting. . . :

"No. 1, respect for the primary role of States and localities in election administration;

"No. 2, establishment of an independent, bipartisan commission appointed by the President to provide nonpartisan election assistance to the States; and

"No. 3, strong antifraud provisions to clean up voter rolls and reduce fraud. No longer will we have dogs, cats, and dead people registering and voting by mail.

"On this last point, I want to tip my hat to Senator Bond, who has been a tireless champion and advocate for strong anti-fraud provisions. His work on this issue has been instrumental in achieving today's agreement." [page S13684]

However the following groups have urged the Senate to make changes: National Association of Secretaries of State; the National Conference of State Legislatures; the National Association of Counties; the National Association of County Recorders, Election Officials and Clerks; the International Association of Clerks, Recorders, Election Officials and Treasurers; and the Election Center. For example, the groups oppose the prominent role to be played by the U.S. Department of Justice, and they urge that funding be provided by block grant. (Additional information may be found below under "Other Views".)

BILL PROVISIONS

This section does *not* summarize the underlying bill; it summarizes Senate Amendment No. 2688, introduced on December 19, 2001:

"Title I – Uniform and Nondiscriminatory Election Technology and Administration Requirements"

Beginning in 2006, the Act requires voting systems used in federal elections (1) to permit voters to verify their ballot choices and to correct errors before a ballot is cast, and (2) to notify a voter if he has voted for more than one candidate for a single office (these are "overvotes"). However, jurisdictions using paper or punchcard ballots may instead establish a program to permit voters to correct errors before their ballots are cast and to educate voters about the effect of overvotes. Notwithstanding these requirements, the voting system must ensure that any notification required by the Act ensures the voter's privacy and ballot confidentiality. Also, the voting system must produce a record that can be audited.

The Act requires at least one voting machine at each polling place to be fully accessible to persons with disabilities, including the blind. Similarly, any system purchased with funds available under title II of the Act must be fully accessible if purchased in 2007 or later.

Section 101(a)(4) requires voting systems to provide "alternative language accessibility" for persons with limited English proficiency. Note that this provision (and all provisions of Title I) apply to "voting systems" (defined in section 101(b), see below) and not just to the act of voting.

The voting system cannot have an error rate that exceeds the standards established by the Director of the Office of Election Administration of the Federal Election Commission.

Section 101(b) defines a "voting system" as equipment and associated software, firmware, and documentation used to define ballots, cast and count votes, report or display election results, and maintain or produce audit trails; as well as practices and documentation used for system identification, testing, and modification, error records, voter information, and voting materials.

Section 101(d) specifies that "nothing in this section shall require a jurisdiction to change" its voting system to be in compliance with the requirement of the Act.

Section 102 requires provisional voting. Beginning in 2004, the Act requires that, if the name of an individual who claims to be eligible to vote in a federal election is not on the official registration list (or if an election official asserts that the individual is not eligible to vote), then the individual must be notified that he or she may cast a provisional ballot. A provisional ballot may then be cast if the

individual gives written affirmation before an election official at the polling place that he or she is indeed registered and eligible to vote. The provisional ballot will then be transferred to the appropriate official for prompt determination of the claim of eligibility. If the claim is verified, the vote will be tabulated. If the vote is not counted, the individual will be notified.

Section 102 also requires public posting on election day of "voter information" which is defined to include a sample ballot, polling places and hours, instructions on how to vote, etc.

Beginning in 2004, section 103 requires each State that requires voter registration to implement an interactive, computerized, statewide voter registration list. The State is to maintain the list in accordance with the provisions of the National Voter Registration Act (NVRA) and to match the list with records on felony status and death. The goal is for the list to contain the name of each registered voter, but no duplicates, and to remove only the names of ineligible or unregistered voters.

An individual who registers by mail, and who has not previously voted in that jurisdiction, shall be required to present photo identification or other identification when first voting unless identification was presented when the individual registered by mail under the provisions of NVRA. Also, the NVRA mail-in voter registration form will be changed to include questions about citizenship and age. Persons who are neither citizens nor old enough to vote will be instructed not to complete the form.

Section 104 authorizes the Attorney General of the United States to bring a civil action against noncompliant States. However, except with respect to voting access for persons with disabilities, States and localities that accept grants under the Act (to meet the requirements of Title I) shall be deemed in compliance with the Act through 2009.

"Title II – Grant Programs"

The House bill authorized $2.65 billion for grants; the Senate authorizes $3.5 billion.

The Act authorizes $3 billion to States and localities to meet the requirements on voting systems standards, provisional ballots, and computerized, statewide voter registration system ($1 billion in FY03; $1.3 billion in FY04; $500 million in FY05; $200 million in FY06; and "such sums as may be necessary" for later years). These grants provide for 100-percent Federal funding.

The Act authorizes $400 million in FY02 (sic) to States and localities to improve, acquire, lease, modify, or replace voting systems and improve accessibility for disabled and special-needs voters; to implement new procedures (such as same-day voter registration) to increase turnout and reduce "disenfranchisement;" to educate voters on voting procedures, voting rights, voting technology, and to train election workers; to implement new procedures to identify, deter, and investigate vote fraud; and to comply with existing federal election laws. The Act further authorizes $100 million in FY02 (sic) to make polling places accessible to persons with disabilities. The $400 million and the $100 million will be distributed through incentive grants that require States and localities to furnish 20 percent of the grant

amount. The Attorney General may, however, adjust this formula in those jurisdictions that lack sufficient resources.

The grants will be administered by the Attorney General in consultation with the FEC and the Architectural and Transportation Barriers Compliance Board (section 221(a)) until the Election Administration Commission (which is created in Title III of the Act) is operating (section 303(a)(7)).

"Title III – Administration"

Title III creates a new independent Federal agency, the Election Administration Commission (EAC), and specifies the Commission's membership, duties, powers, and procedures. EAC will comprise four members appointed by the President with the advice and consent of the Senate. Nominees shall be recommended to the President by the majority leader and minority leader of the Senate and the Speaker and majority leader of the House of Representatives. No more than two commissioners may be from same political party. Commissioners are limited to one six-year term, but initial terms are staggered. The EAC is authorized such sums as may be necessary.

In addition to its power to approve grants (mentioned above), the Commission will gather information, conduct studies, and issue reports on Federal elections issues. It will compile and make available the official, certified results of federal elections and statistics on registration and turnout. It will conduct studies on election technology and administration and submit reports and recommendations to Congress and the President. Section 303(b) lists particular topics that the Commission is to study. The EAC will be responsible for State compliance with provisional voting requirements and the establishment of computerized, statewide voter registration systems. Some powers currently held by the Federal Election Commission are transferred to the EAC.

"Title IV – Miscellaneous"

Section 401 of the Act imposes a fine or imprisonment or both for giving false information with respect to voting or voter registration, or for conspiring to do so, in violation of the Voting Rights Act of 1965. Fines or imprisonment or both also are authorized for giving false information with respect to naturalization, citizenship, or alien registration.

Section 402 provides that the Act does not supersede, restrict, or limit the application of the Voting Rights Act of 1965, the Voting Accessibility for the Elderly and Handicapped Act, the Uniformed and Overseas Citizens Absentee Voting Act, the National Voter Registration Act of 1993, the Americans With Disabilities Act of 1990, or the Rehabilitation Act of 1973. Further, the Attorney General's approval of a grant under Title II shall not affect the requirements for "preclearance" under the Voting Rights Act, 42 U.S.C. §1973c.

[Note: This summary was prepared by RPC using the text of Senate Amendment No. 2688 and the Congressional Research Service's "Electronic Briefing Book" on Election Reform: "Senate Activity:

Summary of S. 565, Substitute Amendment" by Kevin Coleman, Analyst in American National Government (updated January 15, 2002).]

ADMINISTRATION POSITION

No official Statement of Administration Policy has been received; however, on December 12, 2001, the day the House of Representatives passed its bill, the President said:

> "I commend the House of Representatives for today's overwhelming passage of the bipartisan Help America Vote Act. This legislation goes a long way toward adopting reforms advocated by the Ford/Carter Commission on Federal Election Reform, and is based on principles I endorsed and recommended to Congress in July. The Ney-Hoyer bill is a good start in achieving these goals – it respects the value of every eligible vote and the primary role of State, county, and local governments in elections. I look forward to working with Congress to enact responsible election reform before the upcoming 2002 elections."

The four principles that the President endorsed on July 31, 2001, when he met with the Ford-Carter commission, were:

> "First, our nation must continue to respect the primary role of State, county and local governments in elections. In 2000, more than 100 million Americans cast votes in more than 190,000 polling places under the supervision of 1.4 million poll workers. Our nation is vast and diverse and our elections should not be run out of Washington, D.C.
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> "Second, the federal government can have a limited but responsible role in assisting States and localities to solve their problems with election administration so that our voting technology and practices respect the value of every eligible vote.
>
> "Third, we must actively and vigorously enforce the laws that protect the voting rights of ethnic and racial minorities, of citizens who do not speak English fluently, and of the elderly and persons with disabilities. . . .
>
> "Fourth . . ., we must act to uphold the voting rights of members of the armed services and of Americans living abroad. We must safeguard absentee ballots against abuse, and we must ensure that those Americans who risked their lives to defend American democracy are never prevented from participating in American democracy."

COST

The Congressional Budget Office has not done a cost estimate for the substitute amendment. However, estimates were made for S. 565 as reported (CBO estimate of Nov. 27, 2001) and for the House bill as reported (CBO estimate of Nov. 30, 2001).

As noted above, the substitute itself authorizes $3.0 billion for election technology and administration grants over 4 years, and such sums as may be necessary thereafter (section 209). The bill expressly authorizes $400 million for the Federal incentive grant program to remain available without limitation until expended (section 218), and $100 million for accessibility grants, also to remain available without limitation until expended (section 228).

Additionally, there are the costs of setting up and running the new Election Administration Commission. The bill authorizes such sums as may be necessary (section 307).

For the Senate-reported bill (not the substitute), CBO estimated $31 million in additional outlays over five years for administrative costs for the Department of Justice and the Federal Election Commission. That estimate is probably only a "ball park number" for the substitute amendment.

OTHER VIEWS

Common Cause, the League of Women Voters, the United Auto Workers, and other organizations support the substitute amendment. However, as noted elsewhere, the Senate amendment is opposed by many organizations of State and local officials.

For example, the **National Conference of State Legislatures** (NCSL) *endorsed* the House-passed bill, but it *opposes* the Dodd-McConnell substitute because "it does not satisfy the concerns voiced by State and local elected officials and election administrators." NCSL urged the Senate to pass the House bill, but "should such an approach not prove feasible in the Senate," it suggested the following amendments. The NCSL statement is reprinted at length because it gives a helpful perspective on the Senate substitute:

> **"Provide funding through a formula rather than a competitive grant program.** This would ensure that each State receives funding and that no State is penalized for taking early action to improve their election administration systems or rewarded for delaying the necessary improvements. It also eliminates the need for the Justice

Department to exercise independent authority in establishing criteria and procedures for awarding grant funds.

"Restrict the role of the Justice Department in election administration to enforcing the law. Under Dodd/McConnell, the Justice Department is responsible for promulgating binding guidelines that dictate State laws and procedures for administering elections, approving each State's plan for implementing election reforms, administering a cumbersome certification process, and managing the grant program, including determining the criteria for receiving a grant. This is an unjustifiable federalization of the processes that are used to select candidates in every election that is held for federal, State or local office. All responsibilities under this legislation except for enforcement should be transferred to the Election Administration Commission.

"**Eliminate agency rulemaking authority and authority to approve State plans.** The federal government should not dictate States' procedures for implementing reform, provided that these reforms meet a minimum standard specified in the law. All minimum standards should be contained within the legislation.

"Permit the chief election official in each State to provide certification of eligibility. The Dodd/McConnell amendment requires States to submit to a cumbersome application process to seek certification of eligibility for grant funding, including a "specific and detailed demonstration" that the State is already in compliance with existing federal laws. Until the State provides sufficient proof of its innocence of a presumed violation of the law, it is deemed ineligible to receive grant funding. The chief State election official should be permitted to certify eligibility and such eligibility should be revoked only upon a majority vote of the Election Administration Committee that such certification has been falsely provided.

"Require a majority vote of the Election Administration Committee to authorize Justice Department action to enforce minimum standards. The Dodd/McConnell amendment concentrates authority within the Justice Department to both issue guidelines on the permitted mechanisms of complying with the minimum standards and to enforce them. NCSL suggests that an independent body such as the Election Administration Commission be provided with the authority to exercise oversight of such action by the Justice Department.

"Include a mechanism for State and local officials to provide input. Under Dodd/McConnell, there is no formal mechanism for providing comment. Any action by the Justice Department or the Election Administration Commission will have sweeping ramifications for the implementation of election reforms and should be taken only pursuant to comment from organizations representing State and local officials.

"Provide a 'funding trigger' that specifies an appropriations level beneath which the deadlines for State compliance with the unfunded mandates in the bill would be delayed. Such a trigger was included in the final version of H.R. 1 [the education act] with regard to the requirement for States to administer student testing."

POSSIBLE AMENDMENTS

No printed amendments (except for the substitute, No. 2688) had been introduced by press time. However, amendments are expected. Contrary to the hopes of some, it may not be possible to consider and dispose of the bill quickly.

The Senate substitute does not contain a provision on military voting (as does the House bill), and that may be one of the amendments.

Also being considered are amendments that would respond to the suggestions of the National Conference of State Legislatures and other critics. In the House, there was an attempt to give the Federal Government even more power over elections, and that effort may be repeated in the Senate.

Other amendments also are being considered, both technical and substantive.

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